200403

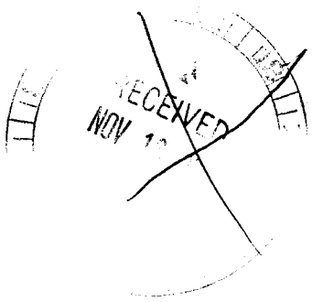
WISCONSIN CENTRAL SYSTEM

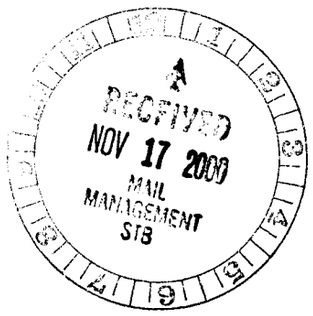
OFFICE:
One O'Hare Centre
6250 North River Road
Suite 9000
Rosemont, IL 60018
Tel (847) 318-4600

MAILING ADDRESS:
P.O. Box 5062
Rosemont, IL 60017-5062

Website: www.wclx.com

November 16, 2000





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VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

Re: **Ex Parte No. 582 (Sub-No. 1)**
Major Rail Consolidated Procedures

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and twenty-five copies of the **Opening Comments of Wisconsin Central System**, dated November 16, 2000. A 3.5-inch computer diskette containing the text of the comments in WordPerfect 7.0 format also is enclosed.

I have included an extra copy of this transmittal letter and of the comments, and would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

Janet H. Gilbert
Vice President & General Counsel

JHG:tjl

Enclosures

cc: Parties of Record

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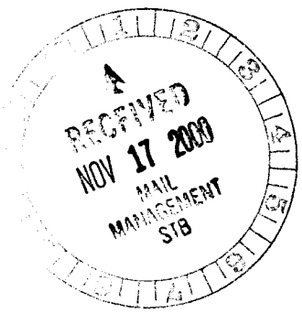
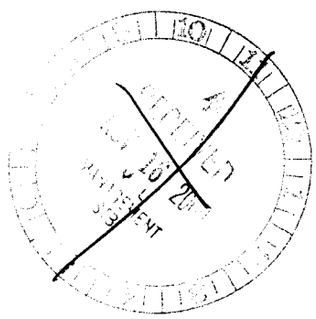


BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

OPENING COMMENTS OF
WISCONSIN CENTRAL SYSTEM



Janet H. Gilbert
Vice President & General Counsel
Wisconsin Central System
6250 North River Road, Suite 9000
Rosemont, Illinois 60018
(847) 318-4691

Thomas J. Litwiler
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721
(312) 540-9440

ATTORNEYS FOR WISCONSIN CENTRAL LTD., FOX VALLEY & WESTERN LTD., SAULT STE. MARIE BRIDGE COMPANY, WISCONSIN CHICAGO LINK LTD. AND ALGOMA CENTRAL RAILWAY, INC.

Dated: November 16, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

OPENING COMMENTS OF
WISCONSIN CENTRAL SYSTEM

Pursuant to the Notice of Proposed Rulemaking served herein on October 3, 2000 ("NPR"), Wisconsin Central System ("WC")[1] submits these opening comments on the Board's proposed revisions to its regulations governing so-called "major" rail consolidation transactions. 49 C.F.R. § 1180, Subpart A. WC understands the general direction that the Board seemingly wants to travel in its new rules. As we expect is the case with many other parties, however, we believe that in charting its revised course the Board has focused too much on some areas, and not enough on others; gone too far in some areas, not far enough in others. The comments that follow focus on issues of particular interest or relevance to WC, while trying to avoid rote duplication of either WC's initial May comments or the comments that will be filed by other parties.

Competition "Enhancements"

WC is not categorically opposed to the Board's oft-stated intent to "raise the bar" on future mega-merger transactions that create transcontinental systems. Certainly WC -- among

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1 WC consists of Wisconsin Central Ltd. ("WCL"), Fox Valley & Western Ltd. ("FVW"), Sault Ste. Marie Bridge Company ("SSMB"), Wisconsin Chicago Link Ltd. ("WCLL") and Algoma Central Railway, Inc. ("ACRI"). Further background on WC is provided in the "Initial Comments of Wisconsin Central System" herein, dated May 15, 2000.

many others -- has felt the sting of recent mergers that failed, at least initially, to perform as expected or represented. Calling for added scrutiny, evidence and assurances in major rail proceedings hardly seems unreasonable in the present circumstances. WC is concerned, however, with the proposed regulations' open-ended requirement that mega-merger applicants must submit proposals to create and enhance competition, and the clear implication that follows from such a statement, i.e., that applications which fail to undertake such broad competition initiatives will be denied.

Essentially, the Board is proposing a system of "competition credits," like smokestack industries that purchase air quality credits in one place so that they can pollute someplace else. The Board has now made it clear that these pro-competitive "remedies" need have no direct relation to any recognized competitive "harms" associated with the transaction. Even more troubling is the implicit message that it is no longer necessary (or at least is less necessary) to specifically identify competitive harms arising from a transaction in the first place. Instead, a certain amount of competitive harm and service disruption seems to be presumed in any transaction, sufficient to justify the need for carrier proposals to reorient the existing competitive landscape. This approach raises both broad and specific concerns.

As a matter of policy, it is difficult to understand why the Board is turning to merger applicants to do what the Board is well-equipped in most instances to do itself. If there is to be a new, pro-competitive movement within the rail regulatory system, the Board should do it directly, through its own statutory powers under the Interstate Commerce Act, and not by using merger proceedings as a back-door tool to produce such results in a necessarily arbitrary and piecemeal fashion, depending on what carriers happen to first engage in mega-mergers after the new rules take effect. WC does not endorse the need for such a reorientation of the Board's

competition policies. But if it is to happen, we would prefer that debate on the subject be open and direct, and that the outcome of the discussion (whatever it may be) be equally available to all.

Thus, if the Board believes that it is time to be more receptive to terminal trackage rights or reciprocal switching arrangements, it should re-evaluate the Midtec standard (to use the pertinent example) in a conscious and forthright manner with relevant input from all interested parties. In that instance, there is no need to use merger policy to do indirectly what the Board is quite clearly empowered to do directly. If it is not time to reevaluate Midtec, then there is no reason to be following one regulatory policy in merger proceedings and another in the rest of the Board's regulatory realm -- particularly when that approach tends to arbitrarily disadvantage some carriers in their competition with others.

These are more than hypothetical musings. One-sided competitive "enhancements" imposed on a transaction could be devastating to a particular carrier's traffic base. For example, a carrier could have many shippers who have access only to a single railroad, but who ship extremely truck-competitive, short-haul, interline traffic. Diversion of that traffic to other carriers through merger-related competitive "enhancements" -- with no opportunity for the carrier to compete for new business elsewhere -- would have serious adverse effects. WC has little doubt about its ability to function -- and function well -- in whatever industry-wide competitive framework the Board chooses to adopt. But a piecemeal approach that essentially assigns a different regulatory policy on competition to carriers that engage in mergers is neither fair for the merger participants nor healthy for the industry or its customers.

The Board is to be commended for introducing flexibility into its merger guidelines and its use of the conditioning power. As WC said in its initial comments, it agrees

with "a less slavish adherence to the principle that merger conditions can never result in a better situation than existed previously." WC Initial Comments at 9. We simply believe that the Board has overshot the mark here -- that it has gone from a merger condition policy that was too inflexible to one that is too expansive, passing over the eminently reasonable ground in the middle. The Board should require that parties in major mergers identify specific competitive harms arising from a proposed transaction, and then identify specific solutions and remedies that address or otherwise relate to the specified harm. Once that occurs, the Board can then use its more flexible approach to craft an appropriate merger condition.

Service/Terminals/Interchange

WC notes and specifically endorses the Board's proposed rules in 49 U.S.C. §§ 1180.1(h) and 1180.10, dealing with (among other things) service assurance plans, terminal operations and interchange with connecting carriers. As WC explained in its initial comments:

> The role of the merger rules should be to assure that, whatever the number of megacarriers left, as those carriers continue to focus their marketing efforts on high volume, transcontinental and international shippers, there remains rail service, and hence rail competitive alternatives, for shippers who are not high volume, long distance transportation users.

WC Initial Comments at 4. We view the proposed regulations in 49 C.F.R. § 1180.1(h) and 1180.10 as at least an initial beginning in addressing these concerns -- in assuring that small and mid-size carriers, focused on short- to medium-distance interline carload freight and dependent in large measure on their Class I connections, remain an integral and functional component of the American freight transportation system. The Board's increased flexibility in crafting merger conditions discussed above has an important role to play here as well.

Having said that, the Board's proposed rules on this subject are extremely broad in nature. WC strongly encourages the Board to develop and implement these regulations in as

tangible and practical a manner as possible. One specific WC suggestion involves "neutral" terminal and switching railroads in major transportation hubs and interchange locations. Where a proposed transaction covered by these new rules would further concentrate the ownership of any such terminal carrier (and it is difficult to imagine any remaining mega-merger which would not), the Board's regulations should provide for the divestment of part of the merging carriers' interest in the terminal carrier to other railroads in the area -- preferably in the first instance to carriers that currently have no ownership interest in the terminal road. Alternatively, the Board could require the elimination of any existing discrimination against non-owners in the pricing of the terminal carrier's services and availability of the terminal carrier's facilities.

Whichever route is taken, effective access to neutral switching and interchange facilities in major terminal areas is an absolute prerequisite if the smaller railroads which comprise the feeder system for the national rail industry are to survive and prosper. Assuring that terminal switching carriers continue to serve their historical, neutral role -- even as their traditional multiple owners merge into two megacarriers -- would be an important step toward that objective.

Cross-Border Issues

WC continues to be perplexed by the Board's continued focus on international ownership of U.S. rail carriers and the imagined difficulties that that practice -- which has gone on, without issue, for much of the last century -- might bring. This is a solution in search of a problem. The Board's very brief narrative on the subject asserts that future mergers "are likely to raise novel transnational issues," NPR at 21, but does nothing to explain why that might be so. The proposed rule itself (49 C.F.R. § 1180.1(k)) raises concerns about the "likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather

than broader economic considerations and be detrimental to the interests of the United States rail network . . . ." Has there been any sign to date that further ownership of U.S. railroads by Canadian National or Canadian Pacific -- each of which already own several -- would lead to such "detrimental" "commercial decisions"? And is there any indication that the Board could not adequately deal with any such unlikely behavior through its own statutory powers and clear jurisdiction over any rail carrier operating in the United States, regardless of its ownership?

The Board, of course, cannot be blamed for looking ahead in developing its new merger rules and trying to anticipate problems that may not be entirely apparent today. Here, however, not only is the problem at issue a tenuous one at best, but the proposed solution is quite likely beyond the Board's authority to implement. That the Board has no jurisdiction over rail operations in foreign countries is uncontroverted. 49 U.S.C. § 10501(a)(2). Yet the Board proposes to require as a matter of course "'full system' competitive analyses and operation plans -- incorporating their operations in Canada or Mexico . . . ." Proposed 49 C.F.R. § 1180.1(k)(1).[2] The Board appears to contend that such intrusions into foreign operations and data are necessary to determine the impacts of a transaction in the United States. That has not been true in the past and there is no evidence that it will be in the future. The nature of the "problem" simply does not warrant the "reach" outside of its jurisdiction which the Board is attempting here.

Ultimately, WC does not see how cross-border issues regarding impacts on our national security or interests are different for railroads than for (to use a recently relevant example) oil companies. No one would argue that crude oil availability is not essential to our

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[2] See also proposed 49 C.F.R. § 1180.3(b) and NPR at 23-24 (abandoning long-standing agency precedent and including foreign carriers not subject to STB jurisdiction in definition of "applicant carriers").

national security, yet several large U.S. oil companies have been allowed to come under foreign control in recent years without public outcry, regulatory concern or undue consequence.[3] The Board should take a similar approach. In the unlikely event that any significant cross-border issues do come up in the context of a merger transaction, they can be dealt with on a case-by-case basis, just as they have -- effectively -- in the past.

Scope of Coverage of Rules

Both WC and The Kansas City Southern Railway Company ("KCS") discussed in their initial comments the proper scope of the Board's new "major" merger procedures, pointing out the significant differences between mergers among the remaining "Big Six" carriers[4] and mergers involving smaller Class I's or potential Class I's. WC Initial Comments at 5-6; Comments of The Kansas City Southern Railway Company, dated May 16, 2000, at 64-81; Reply Comments of The Kansas City Southern Railway Company, dated June 5, 2000, at 26-30. The NPR issued by the Board neither discusses nor considers these arguments,[5] and applies the proposed new rules without distinction to all consolidation transactions nominally involving two or more Class I railroads. 49 C.F.R. § 1180.2(a) ("A *major* transaction is a control or merger

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3 As in the railroad industry, it is also the case that foreign ownership of some domestic oil operations is a long-standing fact, and thus cannot be categorized as a completely new development with unknown consequences.

4 The Burlington Northern and Santa Fe Railway Company ("BNSF"); Canadian National Railway Company, including Grand Trunk Western Railroad Incorporated ("GTW") and Illinois Central Railroad Company ("IC") (collectively, "CN"); Canadian Pacific Railway Company, including Soo Line Railroad Company ("Soo") (collectively, "CP"); CSX Transportation, Inc. ("CSXT"); Norfolk Southern Railway Company ("NS"); and Union Pacific Railroad Company ("UP").

5 The positions of WC and KCS on this subject are summarized without elaboration in the appendices accompanying the NPR. NPR, Appendix C, at 127-128 (KCS); NPR, Appendix D, at 168 (WC).

involving two or more class I railroads.").[6] It should be apparent to everyone involved that all "major" transactions are not created equal, and equally apparent that the Board needs to acknowledge and deal with this fundamental truth in adopting its important and sweeping new merger regulations.

The purpose of this rulemaking proceeding is clear from literally the very first words of the NPR: it is a result of the Board's determination that "our current railroad merger regulations . . . are not adequate to address future major rail merger proposals that, if approved, would likely result in the creation of two North American transcontinental railroads." NPR at 8 (citing Public Views on Major Rail Consolidations, Ex Parte No. 582 (STB served March 17, 2000) ("Public Views")). In that earlier proceeding, the Board explained that after consolidating "aggressively" in recent years, "only six large railroads remain in the United States and Canada." In a footnote the Board identified the six as BNSF, UP, CSXT, NS, CN and CP, and noted that GTW and IC are affiliated with CN while Soo is affiliated with CP. Public Views at 1, n.2.[7] This is the commonly understood structure of large railroads in the United States, and the clear context in which the new major consolidation procedures are being developed.

Thus, for example, the proposed rules focus heavily on the idea that the upcoming mergers to which the rules will apply are the "final" round of such transactions, and will lead

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[6] The Board has not proposed any changes to the existing regulations in 49 C.F.R. § 1180.2, and does not discuss that subsection in the NPR. The new merger policy statement -- what the Board describes as the "centerpiece" of its new rules, NPR at 9 -- does not cross-reference the "major" definition in 49 C.F.R. § 1180.2(a), but instead states that it applies to the "merger or control of at least two Class I railroads." Proposed 49 C.F.R. § 1180.1.

[7] KCS was identified as a "fourth smaller U.S. Class I railroad [that] remains independent but has entered into a comprehensive alliance with CN and IC." Id.

inevitably to responsive mergers by other carriers attempting to protect their market and competitive position in the industry. NPR at 11. This is the reason for the Board's new approach to cumulative impacts and crossover effects, which assumes a "limited range of responsive proposals that could be triggered by any particular transaction" among the big Class I railroads in the nation. NPR at 21.

Yet none of these mega-merger considerations necessarily or even probably applies to transactions involving smaller Class I's or larger Class II's that could eventually become Class I's. A proposal by a large Class I to acquire WC,[8] for example, neither has nationwide implications nor sets up any apparent "responsive" merger by any other carriers. It is simply a regional transaction that increases the feeder lines attached to the larger Class I. It neither changes the character of the larger Class I nor alters the competitive landscape of the national rail system as a whole. As KCS points out, such transactions are akin to the recent successful Canadian National/Illinois Central transaction, which raised substantially fewer issues and featured substantially less participation than other recent mergers. Of equal note, that transaction has created no subsequent service issues to date.

As would be expected against this background, new rules designed to govern mergers among the "Big Six" do not apply comfortably to transactions between a large Class I and a smaller Class I, and could have serious adverse (and perhaps unintended) consequences on the smaller carriers involved in those transactions. Perhaps most significantly, as noted above, application of the new "competition enhancement" policy to smaller Class I railroads with

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[8] As WC is comprised of Class II and Class III carriers, such a transaction would not be covered by the current proposals but by 49 U.S.C. § 11324(d) and 49 C.F.R. § 1180.2(b) or (c), governing "significant" and "minor" transactions.

limited geographic reach, little market power and predominantly short-haul, joint-line, truck competitive traffic could be devastating to the smaller carrier's traffic base and operations. Transcontinental merger rules should not apply to regional rail transactions. We do not believe that the Board had such regional situations in mind when it crafted these standards, and are simply asking that the new rules reflect that fact.

WCL, a component of the Wisconsin Central system, has recently filed with the Board a petition seeking the institution of a rulemaking proceeding to amend the Board's rail classification regulations at 49 C.F.R. § 1201(1-1) and raise the current Class I revenue threshold from $250 million to $500 million. Wisconsin Central Ltd. -- Petition for Rulemaking -- Classification of Carriers, Ex Parte No. ___ (petition filed November 15, 2000). Without favorable action on that petition, WCL could become a Class I carrier as of January 1, 2002. Either in that proceeding or this one, the Board should act to assure that its new major consolidation rules apply to the clearly intended target audience, and not beyond.

New Consolidation Procedures Should Be Less Dependent on Speculation

In a number of instances the Board's proposed regulations call for speculative information or analysis that is likely to cause more confusion than clarity in understanding and implementing the new procedures. The most obvious example involves the proposed treatment of downstream effects, which will require applicants and parties to guess: 1) what subsequent mergers might be pursued in response to the currently proposed merger; 2) whether those subsequent mergers would themselves be in the public interest; and 3) how conditions imposed on the present merger might need to be altered in response to theoretical future mergers. Proposed 49 C.F.R. § 1180.1(i); NPR at 20-21. WC has previously commented on the unwieldy nature of such a process, WC Initial Comments at 12-13, as did many other parties. Vice

Chairman Burkes likewise noted his concern that the proposed rule "may result in too many layers of speculation." NPR at 40. We believe it most certainly does.

At the same time, it remains unclear precisely what benefit is to be gained from engaging in this speculation enterprise. If a proposed merger in the public interest leads to a proposed merger not in the public interest, it would seem the proper course to approve the first and deny the second. We understand the Board's desire not to act blindly, and to avoid a policy that requires it to ignore what is immediately apparent to everyone else. But the "downstream" policy enunciated in the NPR would seemingly require the proponents of the first new merger to justify every future merger -- an "all-in-one" proceeding in which the Board decides in one swoop the final structure of the U.S. rail industry. Such comprehensive planning did not work when the Board's predecessor tried it in the 1920's, or when it tried it again in the 1960's and 1970's during the Union Pacific/Rock Island merger proceeding. The Board should be hesitant to tread that path again here.

Similarly speculative is the Board's indication that it will now consider "alternatives" to merger, to see whether "the benefits claimed by applicants could be realized by means other than the proposed consolidation." Proposed 49 C.F.R. § 1180.1(c). Once again, the Board's motive here is understandable, but the procedure itself may be largely unworkable. Who knows what other arrangements would be available, whether the parties would agree to enter into them, and whether they would work as intended? Such an analysis would rely largely on a paradigm of guesswork, with opposing parties offering their hypothetical constructions of a world that does not exist. As discussed above, the new regulations also rely on speculation and presumption regarding transaction-related competitive harms to require competitive "enhancements" from merger proponents.

Obviously the Board requires a certain degree of flexibility in adjudging the major consolidation proposals that will come before it, and the new merger rules need to accommodate that flexibility. But regulations also need to provide guidance -- to provide some degree of certainty as to what is expected from applicants and some defined notion of the criteria upon which their applications will be considered. Mergers should be judged on their own actual merits, and not on how they could lead to other, undesirable mergers, or could have been structured in a different way than they were, or could lead to presumed, unidentified competitive harms that must be remedied. These speculative components of the proposed regulations weaken rather than strengthen the Board's endeavors here, and should be minimized to the greatest extent possible.

WHEREFORE, WC respectfully submits these comments on the Board's proposed regulations governing major rail consolidation transactions under 49 U.S.C. § 11323, et seq. and 49 C.F.R. § 1180, Subpart A.

Respectfully submitted,

By: _____

Janet H. Gilbert
Vice President & General Counsel
Wisconsin Central System
6250 North River Road, Suite 9000
Rosemont, Illinois 60018
(847) 318-4691

Thomas J. Litwiler
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721
(312) 540-9440

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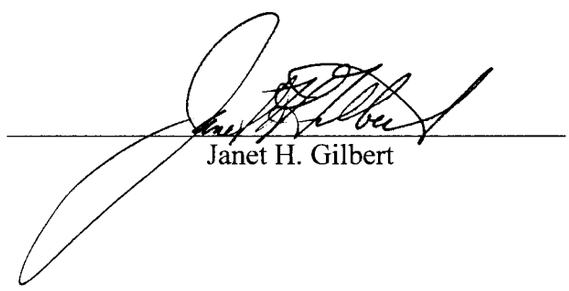
Dated: November 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2000, a copy of the foregoing **Opening Comments of Wisconsin Central System** was served by first-class mail, postage prepaid, upon all parties of record in this proceeding, as identified on the service list issued by the Surface Transportation Board on April 28, 2000 and revised on May 10, 2000, May 12, 2000 and November 8, 2000.



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